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The September 11th Victim Compensation Fund of 2001 and the Protection of the Airline Industry: A Bill for the American People

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THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001 AND THE PROTECTION OF THE AIRLINE INDUSTRY: A BILL FOR THE AMERICAN PEOPLE

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I. INTRODUCTION

THE TERRORIST ACTS of September 11, 2001 shook an already unstable aviation industry to the core and for a moment in time, an entire nation. The attacks perpetrated on four airline flights that crashed at the World Trade Center in New York City, the Pentagon in Virginia, and in Shanksville, Pennsylvania ("the Terrorist Attacks") killed and injured thousands of innocent civilians, threatened our national security, and also struck a blow to some sectors of an ailing economy. The President and Congress were immediately faced with the problems of the airline industry; an industry that employs hundreds of thousands of personnel and that was rapidly devastated by the several-day mandatory shutdown. Those events were also accompanied by fear of travel for virtually every customer and travel restrictions imposed by corporations on its high revenue customer, the business traveler.

In addition to that problem, Congress faced the plight of thousands of families who lost members in the Terrorist Attacks. The victims left behind families, who in most instances had lost their sole or principal wage earner. Thousands more were injured. These events occurred at a time when public assistance is limited in amount and duration, and at a time when unemployment is on the rise. This pool of victims, with no culpable party available to pay restitution, created another financial concern of unusual proportions. The impact on the aviation and insurance industry would be overwhelming if only a fraction of these claimants demanded compensation from airlines, manufacturers and any other parties who had some connection, regardless of how attenuated, to the presence of the terrorists on these aircraft.

If that were not enough to rattle the industry, the property damage claims began to quickly tally into the billions. The destruction of several office buildings, including One and Two World Trade Center, would involve subrogation claims by property insurers. Other businesses in lower Manhattan were immediately shut down and some may never reopen. Estimates of the financial impact in New York focus on whether the bill can be kept below $100 billion.

Rather than wait for the assemblage of committee reports, blue ribbon panels and the like, the House of Representatives moved quickly, some now say, too quickly, to pass a bill that would assure these employers and the public that their Government was not prepared to merely let events run their natural course and destroy a vital transportation industry. A House bill was proposed, debated, passed by the House, adopted by the Senate and presented to the President - all within ten short days of the Terrorist Attacks. On September 22, 2001, the President signed into law the Air Transportation Safety and System Stabilization Act of 2001 ("the Act").[1]

The Act provides several forms of monetary relief for the aviation industry, including up to $15 billion in grants and loans.[2] The method for allocation of that money has been the subject of much debate. The Act provides for airlines with larger shares of passengers and that experienced losses to have access to more funds.[3] The first loan to America West will cost it over $100 million in fees and one third of its stock.[4] The purpose of providing the aid is even more controversial. Many Congressmen argued that the Act preserved multimillion dollar salaries of airline executives, but not the jobs or salaries of rank and file employees.[5] These legislators pressed for relief that would have

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[1] Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42, 115 Stat. 230 (codified as amended in scattered sections of 49 U.S.C.) [hereinafter *System Stabilization Act*].

[2] *Id.* §§ 101-107.

[3] *Id.* § 103(b).

[4] Laurence Zuckerman, *More Strings on U.S. Deal for Airline*, N.Y. TIMES, Dec. 29, 2001, at C1.

[5] 147 CONG. REC. H5877 (daily ed. Sept. 21, 2001) (statement of Rep. Obey); *id.* at H5880 (statements of Reps. Waxman & Sanders); *id.* at H5889 (statements of Reps. Brown & Brady); *id.* at H5890 (statements of Reps. Schakowsky & Udall).

helped avoid employee layoffs.[6] The Act did not ultimately include any linkage to employee protections.[7]

In addition to this direct relief for the industry, the Act also provided indirect relief by sharply limiting the ability of claimants to sue airlines and other potentially culpable parties. If a claimant proceeds with a lawsuit against any airline, airport, or aircraft manufacturer, it must proceed in federal court in Manhattan.[8] Further, no judgment can be entered against any such defendant if it exceeds the policy limits of liability insurance issued to that party.[9]

Since Congress could not equitably (or politically) hamper the rights of claimants to obtain compensation without some recourse, it created an alternative source of recovery. The Act created a new federal fund, The September 11th Victim Compensation Fund of 2001 ("the Fund"), to compensate victims of the Terrorist Attacks.[10] For a Congress that has increasingly expressed concern over a balanced budget in the last several years, the creation of the Fund was indeed a significant event. It creates an unprecedented form of monetary relief from the U.S. Government for persons who were not harmed by any act or omission of the Government. Moreover, Congress placed no limits on the amount that claimants to the Fund can obtain individually or in the aggregate. Considering that 3119 persons were killed in the Terrorist Attacks, claims by all would yield awards to their estates likely exceeding $10 billion.[11] Claims of injured persons will only add to this hefty sum.

Authority to fill in this blank check was delegated by Congress to the Attorney General of the United States, who is, in turn, authorized by the Act to appoint a Special Master.[12] His appointee, Kenneth R. Feinberg, will exercise very broad discretion in the assessment of compensation awards for the victims and their families.[13] But despite this broad discretion, Congress did require that all forms of collateral source benefits received

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[6] *Id.*

[7] *See id.* at H5917 (rejection of motion to recommit bill for inclusion of health benefits for employees laid off by airlines) (statement of Rep. Young).

[8] *System Stabilization Act, supra* note 1, § 408(b)(3).

[9] *Id.* § 408(a).

[10] *Id.* §§ 401, 403.

[11] *A Nation Challenged; Dead and Missing*, N.Y. TIMES, Jan. 6, 2002, at 15.

[12] *System Stablization Act, supra* note 1, § 404(a).

[13] Diana B. Henriques, *Holding the Victims' Pursestrings, Uneasily*, N.Y. TIMES, Dec. 11, 2001, at B1.

by claimants, including life insurance, reduce awards.[14] This variance from the law of many states, including New York, has already created a disincentive for those claimants who are entitled to receive substantial death benefits.[15]

The "interim" Final Rule published by the Special Master provides general parameters on expected recovery, depending on the age, number of dependents and income of each victim.[16] Compensation for noneconomic damages will be paid at uniform amounts for all claimants.[17] Further, the Act does not provide for review of the Special Master's damage assessments by any court or administrative body.[18] He has already signaled a reluctance to issue awards that exceed $3 million total damages.[19]

The resulting limitations from this legislation on both the recovery from the Fund and through litigation will present some claimants with difficult choices. The can pursue compensation from the Fund to obtain a certain award of predictable value. Or they might file a negligence suit against terrorist organizations and perhaps the airlines, security companies, airports, or other property owners to place damage assessments in the hands of juries sympathetic to their losses. Even though plaintiffs do have a choice for recovery, these plaintiffs will have to be nimble enough to clear many hurdles. First, they must locate terrorists or their organizations and prove liability for the Terrorist Attacks. Second, airline industry defendants may garner sympathy from the same juries because they too were attacked in an act of war. Finally, plaintiffs will need a defendant with enough resources to pay a judgment.[20]

In addition to claimants involved and the airlines that avail themselves of federal assistance, the Act also has implications for the industry as a whole as it enters the 21st century. Congress and the President may have envisioned a simple and limited intervention for the airline industry to avoid disruptions more se-

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[14] *System Stabilization Act, supra* note 1, §§ 405(b)(6), 402(4).

[15] Diana B. Henriques, *Official Vows All Families of Victims Will Get Aid*, N.Y. TIMES, Dec. 28, 2001, at B7.

[16] 28 C.F.R. §§ 104.43, 104.45 (2002).

[17] *Id.* §§ 104.44, 104.46.

[18] *Id.* § 104.33(g).

[19] September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66,274 (Dec. 21, 2001) (codified at 28 C.F.R. pt. 104) [hereinafter *Victim Compensation Fund*].

[20] *7 Families Sue Bin Laden and Others for Billions*, N.Y. TIMES, Feb. 20, 2002, at A11.

vere than those already caused by the Terrorist Attacks. However, the Government appears to have taken a first step back to the days before deregulation of the industry.

The strings that the Government attached to the first airline loan under the Act for America West point to a Government intent on exercising close oversight of the industry. By injecting itself to such an extent in daily airline operations, have the Congress and the President agreed that the free market is too strong for the good of the industry? Was a deregulated industry, repeatedly showing signs of distress, primed for one blow that would cause several airlines to capitulate? The airlines appear determined to use the loan program only as a last resort and maintain their independence.[21]

This article examines the Act, including aid to the airlines, creation of the Fund, and limitations on lawsuits. It reviews the Rule promulgated by the Special Master for the Fund and how claimants might proceed to recover damages. The legislative history is considered for motivations on passing the Act. This article also addresses whether claimants will ultimately benefit from the Fund in lieu of filing suit under the constraints imposed by the Act. Finally, this article considers whether these various forms of protection for the airline industry are justified.

II. OVERVIEW OF THE LEGISLATION

The Act was introduced in the U.S. House of Representatives as House Resolution 2926 on September 12, 2001.[22] The President signed the bill into law on September 22, 2001. The Act is divided into six major titles, or sections. Titles I, II and III are directed to the first of two goals, direct financial assistance to the airlines through grants and loans. Title IV fulfills the second goal of indirect assistance to the industry in the form of restrictions on claimants' ability to sue, and the creation of the compensation Fund for victims. Title V supports the President's request to spend an additional $3 billion to support airline safety and security. Title VI is a separability provision.

A. AIRLINE ASSISTANCE PACKAGE

Title I, Airline Stabilization, provides several forms of relief for the airline industry to remedy past losses and expected losses

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[21] Micheline Maynard, *Airlines Shy Away from Loan Guarantees By U.S.*, N.Y. TIMES, Jan. 3, 2002, at C1.

[22] H.R. 2926, 107th Cong. (2001).

in revenues caused by the Terrorist Attacks. The Act provides for loans via federal credit instruments to air carriers, up to an aggregate of $10 billion.[23] The federal credit instruments are to be distributed through an Air Transportation Stabilization Board.[24] The members of that Board are the following officials or their designee: Chairman of the Board of Governors of the Federal Reserve System, designated as chair; the Secretary of Transportation; the Secretary of the Treasury; and the Comptroller General as a nonvoting member.[25]

Applications for loans through the program must be filed by June 28, 2002.[26] The Government has the right to obtain equity in the company upon providing the loan backing to a carrier, a concept that would have been immediately rejected prior to September 11th.[27] The position of Government vis-a-vis the airline industry, while not moving 180 degrees, has undergone a radical shift. The Government no longer sees a close relationship with these private corporations as inconsistent with the basic principles of capitalism and the role of Government in our economic system. Instead, the Act explicitly authorizes the Board to enter contracts that allow the Government to reap gains from the borrower airline's operations, through warrants, stock options, stock, or other equity investments.[28]

The Office of Management and Budget ("OMB") issued regulations to govern the application process.[29] Due to time constraints, public comment was not solicited.[30] OMB stated that it was exempt from the requirements of the Administrative Procedure Act for a notice of rulemaking.[31]

The regulations are extremely detailed and extend eligibility to all carriers, including those in bankruptcy. Key aspects of the regulations include:

* The loan cannot be guaranteed 100 percent by the Government.[32]

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[23] *System Stabilization Act, supra* note 1, § 101(a)(1).

[24] *Id.* § 102(b)-(d).

[25] *Id.* § 102(b)(2).

[26] 14 C.F.R. § 1300.16 (2002).

[27] *System Stabilization Act, supra* note 1, § 102(d)(1)-(2).

[28] *Id.*

[29] 14 C.F.R. § 1300.

[30] Supplementing Information, Preamble to 14 C.F.R. §1300 (not reprinted in the Code of Federal Regulations), *available at* www.whitehouse.gov/omb.

[31] *Id.*

[32] 14 C.F.R. § 1300.14.

* The loan must be repaid within seven years.[33]

* A fee is required and will escalate each year that the loan is outstanding.[34]

* Approval of an application will depend on ability to repay, protection of Government financial interests and lender ability to administer the loan.[35]

The Board also has discretion to prioritize applications based on:

1. A business plan that is financially sound;

2. Greater participation in the loan by non-Federal entities;

3. Greater participation in the loan by private entities as opposed to non-Federal public entities;

4. Warrants or other equity instruments that will allow the federal government to participate in the gains of the company;

5. Concession by creditors, employees, or others that will strengthen the financial condition of the company;

6. The loan proceeds will not be used for payment or refinancing of existing debt;

7. A reduction in the risk of default to the government by reducing the length of the loan, by pledges of collateral, and by other financial structures that minimize the Federal government's risk and cost associated with making the loan guarantees.[36]

America West, the eighth largest carrier in the United States, submitted the first application for the federally backed loan program.[37] On November 13, 2001, America West applied for a government guarantee of $400 million on a loan of $426 million.[38] The terms initially proposed a government fee of $100 million.[39]

The application began a struggle between fiscal conservatives who are cautious about putting billions of taxpayer dollars at

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[33] *Id.* § 1300.15(a).

[34] *Id.* § 1300.18(d).

[35] *Id.* § 1300.17(b)(1)-(3).

[36] *Id.* § 1300.17(b)(4).

[37] It is a noteworthy coincidence that America West is the only carrier created since deregulation with over $1 billion in annual revenues. *See* Laurence Zuckerman, *America West is First Test of U.S. Airline Bailout Program*, N.Y. TIMES, Dec. 27, 2001, at C1.

[38] *Id.*

[39] Laurence Zuckerman, *America West Revises Request to Offer U.S. 10% of Airline*, N.Y. TIMES, Dec. 11, 2001, at C1.

risk, and the airline industry and its Congressional supporters.[40] Some in Congress had already expressed concern that the Board would be able to pick the winners and losers in the economy.[41] The Board denied this charge.[42]

The Board asked America West to revise its application, prompting criticism from some in Congress.[43] The fee was increased to $175 million, plus warrants were offered for the Government to buy 3.4 million shares of stock.[44] The warrants would convey the right, but not the obligation, to purchase shares in the future at a set price. The shares represented 10% of all stock in the carrier.[45]

The Board then demanded more concessions, including an option to buy up to 33 percent of the stock.[46] After America West agreed, the Board tentatively approved a loan package of $445 million, of which $380 million to be backed by the Government.[47] The Treasury Department representative dissented.[48]

Only one other carrier, Vanguard Airlines, has applied to the Board.[49] Vanguard requested a loan package of $60 million.[50] If the lack of any other applications is an indicator, the other airlines have apparently viewed the Government's strong hand as unwelcome. An industry analyst referred to the program as an option to exercise only "if you are on the rocks."[51] However, the airlines have generally refrained from commenting, perhaps knowing that some of them may need to appear before the Board in 2002 with an application. One commuter airline president did obliquely endorse the Government's new interventionist approach, stating that "an activist role in a sick but essential industry is not necessarily a bad thing."[52]

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[40] Zuckerman, *supra* note 37.

[41] 147 CONG. REC. H5888 (daily ed. Sept. 21, 2001) (statements of Reps. Flake & Shadegg).

[42] News Release 2001-43, Office of Management and Budget, OMB Releases Regulations for the Air Carrier Guarantee Loan Program (Oct. 5, 2001), *at* www.whitehouse.gov/omb/pubpress/2001-43.html.

[43] Zuckerman, *supra* note 37.

[44] Zuckerman, *supra* note 39.

[45] *Id.*

[46] Laurence Zuckerman, *More Strings on U.S. Deal for Airline*, N.Y. TIMES, Dec. 29, 2001, at C1.

[47] *Id.*

[48] *Id.*

[49] Maynard, *supra* note 21.

[50] *Id.*

[51] *Id.*

[52] *Id.*

The Act also provides for compensation to air carriers in an aggregate of $5 billion in grants for losses that are incurred from the date of the attacks through December 31, 2001 as a direct result of the terrorist attacks.[53] The compensation available to each air carrier for the losses incurred after September 11th and prior to year-end is payable at a maximum of the ratio of that air carrier's available seat miles for August 2001 to the total available seat miles of all air carriers for August 2001.[54] Thus, the larger the airline's share of seat miles in comparison to the remainder of the industry, the larger potential payout available for its proven losses during the specified time period. A similar method of calculation for losses during this time applies to air cargo transportation based on revenue ton miles.[55] These grants are taxable as gross income.[56]

This system for allocation of a fixed loss reserve, albeit a significant one at $5 billion, spawned some criticism. The almost certain result will be larger payouts to the six largest carriers - United, Delta, American, Continental, US Airways, and Northwest - in comparison to smaller carriers. Virtually every carrier, big and small, was deeply affected by the decline in passenger revenue miles following the Terrorist Attacks.[57] Most carriers furloughed or laid off many employees.[58] One Congressman criticized the Act as favoring bigger carriers to increase their likelihood of riding out the storm of September 11th, although money could have been used for smaller airlines that might have been healthier before September 11th.[59] Near year-end, $3.8

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[53] *System Stabilization Act, supra* note 1, §§ 101(a)(2), 103.

[54] *Id.* § 103(b)(1)-(2)(A).

[55] *Id.* § 103(b)(1), (2)(B).

[56] *Id.* § 301(b).

[57] *See* Scott McCartney, *American Air, Continental Report Losses Total Almost $1 Billion*, WALL ST. J., Jan. 17, 2002, at A4. AMR Corporation, parent company of American Airlines, reported losses of $798 million for the last quarter of 2001. The company further reported a passenger revenue decline of 31.8%, with business travel "down significantly" in the last quarter. The same quarter in 2000 yielded profits for AMR of $47 million. Overall, AMR experienced total losses of $1.76 billion for 2001, compared with earnings of $813 million for the year 2000. As a result of these losses, American received $29 million in after-tax income grants provided for in the Act. *Id.* Like American, Continental Airlines experienced significant losses. Continental reported losses of $149 million for the last quarter of 2001. Continental forecasts that it will lose between $3 and $4 million per day in the first two months of 2002. In December of 2001, Continental lost approximately that amount each day. *Id.*

[58] 147 CONG. REC. H5885 (daily ed. Sept. 21, 2001) (statements of Reps. Ramstad & Hastings).

[59] *Id.* at H5879 (statement of Rep. Sensenbrenner).

billion had been distributed to 115 airlines.[60] This included $98 million to America West.[61]

The legislation also created certain constraints on employee compensation as an incentive for the airlines to impose some internal, fiscally responsible measures.[62] From September 11, 2001 to September 11, 2003, no employee of an air carrier that receives federal credit instruments pursuant to the Act can receive compensation in any twelve-month period that would exceed the calendar year 2000 compensation for that employee.[63] Additionally, any employee with a salary exceeding $300,000 cannot receive a severance pay greater than twice the maximum total compensation for that employee in calendar year 2000.[64]

The preservation of regular routes for passengers and cargo is another subject of protection by the Act. The Act provides the Secretary of Transportation with authority to require carriers receiving financial assistance pursuant to the Act to maintain scheduled air service to any points that were served by that carrier before the terrorist attacks.[65] Additionally, the Secretary of Transportation can require air carriers receiving direct financial assistance under the Act to enter agreements that provide for scheduled air service to those same communities.[66] The President must report to the Congress the financial status of the air carrier industry on February 1, 2002 and then update over the same report by April 21, 2002.[67]

Title II of the Act sets forth various provisions of relief with respect to insurance for air carriers. The Secretary can reimburse air carriers for increases in premiums on coverage for risks ending before October 1, 2002 in comparison to premiums applicable during the week prior to the Terrorist Attacks.[68] The Government agrees to act as if it were an excess insurer by providing for payment of all damages to third parties in excess of $100 million, for losses occurring in the 180 days after the passage of the Act related to acts of terrorism against an air carrier.[69] Any lawsuit filed for such a future terrorist event will not

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[60] Zuckerman, *supra* note 37.
[61] *Id.*
[62] *System Stabilization Act*, *supra* note 1, § 104(a)(2).
[63] *Id.* § 104(a)(1).
[64] *Id.* § 104(a)(2).
[65] *Id.* § 105(c)(1).
[66] *Id.* § 105(c)(2).
[67] *System Stabilization Act*, *supra* note 1, § 106.
[68] *Id.* § 201(b)(1).
[69] *Id.* § 201(b)(2).

be permitted to include a prayer for punitive damages against an air carrier.[70]

Title III provides some limited tax relief for airlines with respect to excise taxes.[71]

B. THE FUND

Title IV of the Act provides general ground rules for how compensation will be made available for victims and their families. The Congressional mandate for the Fund has few details:

* Recovery permitted for death and bodily injury, but not psychological injury alone or property damage;[72]

* Compensation allowed for virtually all categories of damages except punitive damages;[73]

* No cap on damage awards;

* Waiver of the right to sue once a claim is filed;[74]

* No double recovery via collateral sources.[75]

The remaining details for operation of the Fund are left to the Attorney General for delegation to the Special Master whom he was directed to appoint.[76]

1. General Legislative Provisions

The stated purpose of the Fund is to provide compensation to any individual or the relatives of a deceased individual who was physically injured or killed as a result of the Terrorist Attacks.[77] Claims are permitted by individuals who were present at one of the three terrorist attack sites or who were "in the immediate aftermath" of the Terrorist Attacks and suffered physical harm or death as a result of the Terrorist Attacks.[78] Members of the flight crews and passengers on the four airline flights are explicitly included except for any individual identified by the Attorney General as a participant or conspirator in the terrorist attacks.[79]

The legislation does not address whether a claimant must be a citizen of the United States at the time of the Terrorist Attacks.

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[70] *Id.* § 405(b)(5).
[71] *Id.* § 301.
[72] *System Stabilization Act, supra* note 1, § 403.
[73] *Id.* §§ 402(5), (7), 405(b)(5).
[74] *Id.* § 405(c)(3)(B)(i).
[75] *Id.* § 405(b)(6).
[76] *Id.* § 407.
[77] *System Stabilization Act, supra* note 1, § 403.
[78] *Id.* § 405(c)(1)-(2).
[79] *Id.* § 405(c)(2)(B).

Nor does the legislation require that a claimant have a residency in the United States at the time of the attacks. This appears to allow claims by victims who were only visiting the United States on a legal basis, for business or pleasure, at the time of the Terrorist Attacks. The question of whether a person present in the United States illegally can recover a compensation award at taxpayer expense remains unknown.

In order to recover, a claimant is not required to prove negligence against any entity.[80] Compensatory damages are awarded for economic and non-economic loss, but no claimant is entitled to seek punitive damages.[81] Upon the submission of a claim form prescribed by the Special Master, a claimant is entitled to receive economic losses consisting of any pecuniary loss, including loss of earnings or other employment benefits, medical expenses, loss of services, burial costs, loss of business and opportunities, to the extent that recovery for those losses is allowed under the "applicable state law."[82] But the Act does not define the meaning of "applicable state law." If the Special Master were to apply any choice of law analysis that results in the application of damages law from different states or countries, large disparities could result in the amount of economic loss damages for similarly situated claimants. As set forth in Section II.B.2., *infra*, the Rule employs a method of claims analysis based on standard award tables, but doubts will remain on state law application due to a carryover of the "applicable state law" wording into the Rule.

Curiously, the legislation places no similar limitation on the recovery of non-economic losses.[83] Non-economic losses are defined to encompass those intangible losses provided by the most generous of state wrongful death laws. The Act lists physical and emotional pain, suffering, inconvenience, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium, hedonic damages, injury to reputation, and any other non-pecuniary losses of any kind as reasonable non-economic losses.[84] Few, if any, states in the United States permit such a broad scope of non-economic losses in a wrongful death and survival action.

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[80] *Id.* § 405(b)(2).

[81] *Id.* §§ 405(b)(1)(B)(i), 405(b)(5).

[82] *System Stabilization Act*, *supra* note 1, §§ 405(b)(1)(B)(i), 402(5).

[83] *Id.* § 402(7).

[84] *Id.*

One of the more controversial sections of the legislation requires the Special Master to reduce each award by the amount that a claimant has received or is entitled to receive from a collateral source.[85] "Collateral source" is defined broadly to include "all collateral sources, including life insurance, pension funds, death benefit programs, and payment by federal, state or local governments related to the terrorist attacks."[86] Arguably, the inclusion of charitable contributions within that definition of collateral sources to be deducted from each award was a source of concern among many claimants and donors to charities.[87] The Special Master ultimately concluded that the Act left that issue to his discretion.[88]

Each claim must be reviewed and the award determined within 120 days of filing.[89] Then, payment must be issued within twenty days of that determination.[90] No claim can be filed more than two years after promulgation of the regulations governing the Fund (i.e. December 21, 2003).[91]

The Act contains a one-sentence provision that reserves to the Government the right of subrogation for any claim it pays.[92] There is little information as to what the Government intends to do with its powers as a plaintiff, which could include civil suits against the terrorists or even airline industry defendants. One commentator suggests that the Government remains interested in pursuing recovery for itself of terrorist organization assets.[93] This potential motive could conflict with those persons who sue foreign governments and terrorists for damages.[94]

2. *The Rule*

The Act requires publication of rules by December 21, 2001 that contain precise specifications for the form for filing a claim,

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[85] *Id.* § 405(b)(6).

[86] *Id.* § 402(4).

[87] *See, e.g.*, Henriques, *supra* note 13; Air Transportation Safety and System Stabilization Act, Public Comment No. W000749 (Nov. 1, 2001), *available at* http://www.usdoj.gov/victimscompensation/W000749.html.

[88] *Victim Compensation Fund, supra* note 19, at 66,279.

[89] *System Stabilization Act, supra* note 1, § 405(b)(3).

[90] *Id.* § 406(a).

[91] *Id.* § 405(a)(3).

[92] *See id.* § 409.

[93] Pamela Falk, *Families of Missing Have Three Options*, N.Y L.J., Nov. 27, 2001, at 5.

[94] *7 Families Sue, supra* note 20 (suit against bin Laden, Iran, Iraq, Al Qaeda, the Taliban, and Zacarias Moussaoui seeks $101 billion in damages).

information to be submitted by claimants, procedures for hearing and presentation of evidence, procedures to assist claimants in filing and pursuing claims and the methods to be used in the determination of awards.[95] Due to the time constraints imposed by the Act, as well as public pressure to disburse benefits as soon as possible, the Department did not publish a draft rule for comment.[96] The Department noted an exception under the Administrative Procedure Act for implementation of a benefits program and concluded that good cause existed to exempt the rule from the notice of rulemaking and public comment.[97]

In lieu of notice and comment, on November 5, 2001, the Attorney General issued a Notice of Inquiry and Advance Notice of Rulemaking.[98] The Notice provided the public with twenty-one days to comment on the following six topics:

* Format and content for the claim form;

* Criteria for determining information sufficient to deem a claim "filed;"

* Procedures for presentation and hearing of evidence, including qualifications and authority of hearing officers, recording of hearings, interrogation of witnesses, review by the Special Master of rulings by hearing officers;

* Assistance to claimants by experts, counsel or other representatives and any appropriate fee limitations;

* Eligibility of claimants, including proximity to the crash sites, threshold of injury for victims, qualifications for and responsibilities of the personal representative of a decedent;

* Nature of compensation and methods of calculation, including use of statistical models to determine economic loss, use of experts by the Special Master, predicting future income streams, how state law impacts the analysis, individualizing awards for noneconomic loss versus standardized values on losses, defining "collateral sources" that must be deducted from awards and determining whether a claimant is "entitled" to future collateral sources.[99]

The Attorney General also noted that the Department welcomed comments on any other aspect of the Fund.[100]

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[95] *System Stabilization Act, supra* note 1, § 405(a)(2).

[96] *Victim Compensation Fund, supra* note 19, at 66,280.

[97] *Id.*

[98] September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 55,901 (Nov. 5, 2001) (codified at 28 C.F.R. pt. 104).

[99] *Id.*

[100] *Id.*

The Department received over 800 comments.[101] All were posted to its website, most with the author's name redacted.[102] Some comments refer to earlier comments of other persons.[103] Comments continued to pour in even after the November 26th deadline. The Department stated that it reviewed all comments before issuing the interim Final Rule.[104]

The comments came from extremely diverse sources. Some comments were submitted by victims and their families, as well as by members of the general public.[105] Other comments were received from legal counsel for the Governor of New York and City of New York, Attorney General of Connecticut, and members of Congress.[106] United Airlines and American Airlines, as well as the Association of Flight Attendants, submitted comments.[107] Additionally, many legal and charitable organizations provided input, including the American Arbitration Association, American Bar Association, National Center for Victims of Crime, Oklahoma Crime Victim Compensation Board, American Civil Liberties Union, Consumers Union and Lambda Legal Defense and Education Fund.[108]

A late but significant number of comments were received on a topic not listed among the six topics in the Attorney General's Notice. Many persons expressed their belief that the Fund should compensate unmarried and/or same sex companions of victims.[109] Most of these comments appeared in virtually identical wording, indicating they were likely organized by an interest group seeking broad support on the issue.[110] Comments subse-

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[101] *Victim Compensation Fund, supra* note 19, at 66,288.

[102] *Id.* at 66,276. For a complete review of all comments received, see the Department of Justice's information regarding the Act at http://compensation/.

[103] *Id.*; *see, e.g.*, September 11th Victim Compensation Fund of 2001, Public Comment No. N000369 (Dec. 21, 2001), *available at* http://www.usdoj.gov/victimcompensation/interim/N000369.html.

[104] *Victim Compensation Fund, supra* note 19, at 66,276.

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *E.g.*, September 11th Victim Compensation Fund of 2001, Public Comment No. A001762 (Dec. 14, 2001), *available at* http://www.usdoj.gov/victimcompensation/A001762.html (Ensure Parity in Fund Distribution).

[110] *E.g.*, *id.* at Public Comment Nos. A001543 (Dec. 13, 2001), *available at* http://www.usdoj/gov/victimcompensation/A001543.html (Implementation of 9/11 Fund) & A001454 (Dec. 11, 2001), *available at* http://www.usdoj.gov/victimcompensation/A001454.html (Compensate ALL Victims).

quently were filed with the opposing view, many also using a uniform format.[111]

The Special Master, Kenneth Feinberg, published an "interim" Final Rule ("the Rule") on December 21, 2001 in a timely fashion under the schedule established by the Act.[112] The Rule was issued in this manner so that the Department could solicit comments for an additional thirty days after publication, which gave them until January 21, 2002. The Rule appears as Part 104 of Title 28 of the Code of Federal Regulations. A detailed summary of the public comments is set forth in an appendix to the Rule.[113]

Comments continued to be received, at least half of which have addressed to the issue of damage awards to unmarried companions of decedents. This later surge of proponent letters appears to be organized by Amnesty International.[114] Also, protests against the collateral source deductions have continued by victims and members of Congress.[115]

Support for awards to the victims has not been unanimous. Some comments express disappointment, and some even disgust, for the general principle of compensating the victims of the Terrorist Attacks or for the request by some victims' families for enhanced compensation.[116]

One article has raised the issue of whether this type of a fund should be provided for victims of all tragic accidents, not simply

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[111] *E.g.*, *id.* at Public Comment Nos. N000053 (Dec. 20, 2001), *available at* http://www.usdoj.gov/victimcompensation/N00053.html (Are Homosexual Marriages Legal in New York or Washington, D.C.?) & N000370 (Dec. 21, 2001), *available at* http://www.usdoj.gov/victimcompensation/N000370.html (Protect Traditional Marriage).

[112] 28 C.F.R. pt. 104.

[113] *Victim Compensation Fund*, *supra* note 19, at 66,287-291.

[114] *E.g.* September 11th Victim Compensation Fund of 2001, Public Comment No. N000372 (Dec. 21, 2001), *available at* http://www.usdoj.gov/victimcompensation/N000372.html (Relief).

[115] Elissa Gootman, *In Last Days for Comment, Victims' Fund is Under Fire*, N.Y. TIMES, Jan. 7, 2002, at B4; *see, e.g.*, September 11th Victim Compensation Fund of 2001, Public Comment No. 001564 (Jan. 11, 2002).

[116] *E.g.*, September 11th Victim Compensation Fund of 2001, Public Comment Nos. N000411 Dec. 21, 2001), *available at* http://www.usdoj.gov/victimcompensation/N000411.html (Compensation for the 9/11 Victim Families), N000404 (Dec. 21, 2001), *available at* http://www.usdoj.gov/victimcompensation/N000404.html, N000392 (Dec. 21, 2001), *available at* http://www.usdoj.gov/victimcompensation/N000392.html (Lucky to Get Anything), & N000375 (Dec. 21, 2001), *available at* http://www.usdoj.gov/victimcompensation/N000375.html (Compensation).

the Terrorist Attacks.[117] The need to begin accepting claims on December 21st necessitated publishing rules that may not have been as fully digested and widely accepted as would have been preferred.

A Final Rule, published on March 13, 2002 made very few changes to the existing interim Final Rule.

a. Claimant Eligibility

The Rule includes as eligible claimants the basic affected classes: i) persons on the four flights (other than terrorists and conspirators); and ii) persons injured or killed at the three crash sites.[118] The Rule imposes multiple criteria for persons in those two groups before the threshold for recovery is satisfied.[119] The Rule does not resolve explicitly the controversy over recovery by unmarried and same-sex partners of victims. With respect to injured claimants, many may not be able to satisfy the stringent criteria.

First, recovery is limited to those persons who sustained death or injury in the "immediate aftermath" of the Terrorist Attacks.[120] This term is defined as the twelve hours following the Terrorist Attacks for all claimants, except for rescue workers who assisted in efforts to search for and recover victims.[121] That group can file claims for injuries sustained within 96 hours after the crashes.[122]

Second, the person must have sustained "physical harm" as defined by the Rule.[123] The physical harm requirement means three elements must be satisfied: i) a "physical injury to the body"; ii) treatment by a medical professional up to 72 hours of injury or rescue; and iii) hospitalization as an in-patient for at least 24 hours or at least partial physical disability, incapacity or disfigurement on a temporary or permanent basis.[124] Additionally, contemporaneous medical records made by or at the direction of the medical professional that provided the medical care must verify the physical injury.

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[117] Peter H. Schuck, *Equity for All Victims*, N.Y. TIMES, Dec. 19, 2001, at A35.
[118] 28 C.F.R. § 104.2(a).
[119] *Id.* § 104.2.
[120] *Id.* § 104.2(a).
[121] *Id.* § 104.2(b).
[122] *Id.*
[123] 28 C.F.R. § 104.2(a)(1).
[124] *Id.* § 104.2(c).

This second element appears to exclude an entire class of persons, perhaps quite large in number, who sustained psychological trauma as a result of being in the immediate vicinity of the Terrorist Attacks and who have been treated by mental health professionals as a result.[125] The thousands of persons evacuated from the Pentagon or the two World Trade Center towers and adjacent buildings, who witnessed one or more of the crash of the aircraft, the collapse of the towers, people jumping from the towers, and other horrific sights, will *not* be eligible for compensation from the Fund. The legislative history does not shed light on the basis for this decision. Credit must be given to the Special Master for addressing this restriction candidly in the Rule so that potential claimants are not misled into foregoing a tort claim despite the impossibility of recovery from the Fund.[126] Whether claimants will try to assert that a psychological injury has a physical component remains to be seen.

Third, the victim must have been "present at the site" of one of the three crashes.[127] The Rule defines the proximity as either the buildings or portions of buildings destroyed by the crashes or any area contiguous to the sites that the Special Master determines was sufficiently close to present a risk of physical harm from impact, fire, explosions, or building collapses.[128] The latter condition is further explained as "the immediate area in which the impact occurred, fire occurred, portions of buildings fell, or debris fell upon and injured persons."[129]

A victim killed in the Terrorist Attacks must have an approved "personal representative" pursue a claim for them.[130] The Rule identifies a hierarchy of persons who will be permitted to file a claim for a decedent: first, the person appointed by a court of competent jurisdiction to serve as Personal Representative or as executor/administrator of the estate; if no such appointee exists, within the discretion of the Special Master, the person named in the will as the executor/administrator of the estate; if

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125 *Victim Compensation Fund, supra* note 19, at 66,276 ("*Congress did not intend for this Fund to compensate those who suffered only emotional harm. . . .*") (emphasis added).

126 *Id.*

127 28 C.F.R. § 104.2(a).

128 *Id.* § 104.2(e)(1), (2).

129 *Id.*

130 *Id.* §§ 104.2(a)(2),(3), 104.4(d).

no will exists, the person first in line of succession per the law governing intestacy of the decedent's domicile.[131]

A Personal Representative must serve written notice of intention to file a claim using the form designated by the Rule before filing a claim with the Fund.[132] The written notice must be served personally or by certified mail on the immediate family, executor/administrator, and all persons who reasonably could be expected to claim damages related to the wrongful death of the decedent.[133] Objections must then be filed within thirty days to create a "dispute," which the Rule states will not be resolved by the Special Master.[134] He may suspend adjudication pending resolution by a court, value the claim, and place the award in escrow, or proceed if the disputing claimants can agree to a temporary personal representative.[135]

b. Two Tracks to Awards

Once they submit the requisite claim forms that have been published as part of the Rule, the Rule provides claimants with two options or "tracks."[136] The only meaningful distinction is that a hearing is optional with one track and automatic with the other.[137] Under Track A, a claims evaluator determines eligibility and the award made pursuant to the "presumptive award methodology" described at Section II.B.2.c., *infra*, or a determination that the claimant is ineligible.[138] The claimant can either accept the award or demand a hearing before the Special Master or his designee.[139]

Under Track B, the claims evaluator communicates only eligibility to the claimant, who then proceeds automatically to a hearing.[140] At that time, the claimant is advised of the amount of an award. The claimant can seek a modification but will not obtain a revised award unless he or she shows "extraordinary circumstances" not adequately addressed by the standardized damages tables.[141]

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131 *Id.* § 104.4(a).
132 28 C.F.R. § 104.4(b).
133 *Id.*
134 *Id.* § 104.4(c).
135 *Id.* § 104.4(d).
136 *Id.* § 104.31(b).
137 28 C.F.R. § 104.31(b).
138 *Id.* § 104.31(b)(1).
139 *Id.*
140 *Id.* § 104.31(b)(2).
141 *Id.*

Once the claimant receives notice of an award (Track A) or eligibility (Track B), a supplemental submission can be filed in a form provided by the Special Master.[142] A hearing is requested (or held automatically with Track B) to permit the claimant or his designee to present evidence or information relevant to a full understanding of the claim.[143] Counsel can, but need not be, retained.[144] A claimant can also present expert witnesses, who can be subject to "review of credentials" and questioning by the Special Master or his designee.[145] The claimant may choose whether the hearing is open to the public or private.[146] Hearings are expected to run approximately two hours but no cut-off will be imposed.[147]

Following the hearing, a final award is rendered.[148] No written record of deliberations must be created or provided to the claimant.[149] No review or appeal lies from this final determination of award.[150] The amounts of awards may be published for guidance to prospective claimants, but the names of claimants and victims will remain confidential.[151] Given the stated goal of publication, it can be assumed that publication of awards will include a summary of the claimant's circumstances.

c. "Presumptive" Economic Loss for Decedents

The Rule requires the creation of loss tables with standard awards for economic losses, depending on the age, number of dependents, spouse, and income of the deceased victims.[152] These "Presumed Loss" tables will not automatically be used for injured claimants.[153] The tables were published simultaneously with the Rule on December 21st and have created a major point of contention with claimants.[154]

By creating the tables, the Special Master attempted to tread the fine line between two competing interests: considering the

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142 28 C.F.R. § 104.33(a).
143 *Id.* § 104.33(b).
144 *Id.* § 104.33(d).
145 *Id.*
146 *Id.* § 104.33(c).
147 28 C.F.R. § 104.33(c).
148 *Id.* § 104.33(g).
149 *Id.*
150 *Id.*
151 *Id.* § 104.34.
152 28 C.F.R. §104.43(o).
153 *Id.* § 104.45(a).
154 *E.g.*, Gootman, *supra* note 115.

"individual circumstances" of each claim and avoiding disparity of awards between "similarly situated" claimants. The first concern is required by the Act. The second is the stated intention of the Special Master.[155]

How individualized a review process Congressional legislators anticipated, they did not disclose. By requiring the review and processing of each claim within 120 days of filing, the Act does not afford substantial time for the Special Master to truly individualize his review of what will likely total thousands of claims.[156] The Congressional priority of expediency, desirable under the circumstances for many claimants, inevitably sacrificed what might have been a more detailed review process.

The Special Master, on the other hand, presented an introductory statement in the Rule that stresses the potential inequity of grossly disparate financial awards. Indeed, he states outright that awards exceeding $3 million "will rarely be appropriate," regardless of whether the income of the decedent would otherwise support greater numbers under the general methodology employed for computation of economic losses.[157] He concludes that awards based solely on replication of future income streams might be excessive relative to the needs of these claimants and insufficient relative to the needs of others.[158] On the other hand, he has set a baseline award, before collateral source deductions, of $300,000 for victims without dependents and $500,000 for those with dependents.[159] The Final Rule notes that economic loss awards will rarely fall below $250,000.

Whether these two interests can be reconciled will depend on how claims and claimants are treated by the Special Master and his staff. The process must actually afford claimants the review they deserve, as well as convey to them that such a process is in fact occurring. Emotions will run high with families determined to maximize compensation from, what will be for many, the only chance to recover damages from any source. The likelihood of many families successfully availing themselves of the option also to sue the terrorist perpetrators is sufficiently remote that they will view the Fund as the only realistic opportunity to recover damages.

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155 *Victim Compensation Fund, supra* note 19, at 66,278. "In principle, similarly situated claimants should not receive dramatically differing treatment." *Id.*

156 *System Stabilization Act, supra* note 1, § 405(b)(3).

157 *Victim Compensation Fund, supra* note 19, at 66,274-75.

158 *Id.*

159 28 C.F.R. § 104.41.

The use of Presumed Loss tables, as a benchmark but not an absolute, may prove to be a wise choice for providing predictability to these claimants. Representatives of decedents must know the approximate award *before* they file a claim with the Fund and forego a lawsuit.[160] There simply is no other way to provide every claimant with an estimate of his or her award.

The Presumed Loss tables were created through a five-step process.[161] Claims will be analyzed using the same steps, with the tables as a guide:

1. The potential pre-tax total compensation of victims for 1998-2000 was considered, including some fringe benefits such as medical premiums.[162] The Rule states that the three years of compensation for actual claimants might be averaged if the Special Master finds it to be appropriate.[163] (Alternatively, the highest year or the most recent year could be used.) The income is then reduced by the amount of taxes that would have been paid pursuant to the law of victim's domicile.[164] If the victim's compensation was higher than the 98th percentile of wage earners (i.e. exceeded $225,000), the final column of the loss table is still used.[165] This means the claim award will be calculated using an effective presumed award for a salary of $225,000, despite the claimant having earned multiples of that amount per year.

2. The presumed income stream is increased annually for inflation and merit raises, assuming rates of 6.6 percent annually for persons less than age 30, 5.1 percent for persons age 31 to 50, and 4.2 percent for persons over age 50.[166] The calculations are based on actuarial data analysis.[167]

3. The years of remaining work life are calculated using Worklife Estimates published by the U.S. Department of Labor, Bureau of Statistics based on gender and age at time of death.[168]

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160 *Victim Compensation Fund, supra* note 19, at 66,278.

161 U.S. Dep't of Justice, September 11th Victim Compensation Fund of 2001, *Presumed Economic and Non-Economic Loss Tables*, § II.A.1., *available at* http://www.usdoj.gov/victimcompensation/vc_matrices.pdf [hereinafter *Presumed Economic Loss Tables*]

162 28 C.F.R. § 104.43(a).

163 *Id.*

164 *Presumed Economic Loss Tables, supra* note 161, at Step One.

165 *Id.*

166 *Id.* at Step Two.

167 *Id.*

168 *Id.* at Step Three.

4. The award is reduced to present value using a rate of 5.13 percent per annum on an investment of the principle.[169] The Rule states that the rate is equivalent to a long-term, risk-free rate of return on investment.

5. The award is reduced for consumption, depending on the number and age of dependents. Consumption will be limited to certain Bureau of Labor Statistics items, such as food, clothing, and transportation.[170]

Families of victims who were retired or not employed will be compensated based on the value of replacement services.[171] This is not defined but appears to reference household services. Awards for persons with less than three years of employment will be calculated on an individual basis.[172] Economic loss for minors may be based on average incomes for all wage earners.[173]

The problem of creating just the right balance between actual loss and "equitable" awards is further complicated by the limitation in the Act that economic loss will be awarded only to the extent allowed under "applicable" State law.[174] Which state law applies is not defined by the Act. The limitation is reiterated by the Rule and could result in significant limitations on awards to some classes of claimants.[175] According to the Rule, "the Special Master is not permitted to compensate claimants for those categories or types of economic losses that would not be compensable under the law of the state that would be applicable to any tort claims brought by or on behalf of the victim."[176]

The largest group of claimants affected by the "applicable" state law constraint will probably be those seeking recovery on behalf of unmarried persons, with no dependents, domiciled in New York. If New York law were to govern their prospective tort claims, very little money would be awarded for lost income of the decedent because financial dependency of immediate family members is required.[177] Conversely, the Presumed Loss tables

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169 *Presumed Economic Loss Tables, supra* note 161, at Step Four.

170 *Id.*

171 28 C.F.R. § 104.43(c).

172 *Presumed Economic Loss Tables, supra* note 161, § I.

173 28 C.F.R. § 104.43(a).

174 *System Stabilization Act, supra* note 1, §§ 405(b)(1)(B)(i), 402(5).

175 *See* 28 C.F.R. § 104.42.

176 *Id.*

177 N.Y. EST. POWERS & TRUSTS § 5-4.3(a) (Consol. 2001); *see also id.* § 4-1.1.

provide for economic loss awards as high as $2,278,000 for a decedent in those circumstances.[178]

d. Economic Loss for Survivor Claims

Survivor claims will not necessarily be based upon the Presumed Loss tables.[179] The Rule provides for review on a case-by-case basis *or* use of the tables with appropriate modifications.[180] The Special Master will make determinations on length of and extent of disability based upon government and insurance company reports and medical records.[181] The Rule is silent as to whether an award can be issued for a disability caused entirely or in part by a psychological injury to a person who also sustained a physical injury. The wording of the Rule does not foreclose that option.[182]

e. Noneconomic Loss Awards

The Rule requires a predetermined award for every decedent at $250,000 plus an additional $100,000 for a spouse and for each dependent.[183] This set amount of an award applies regardless of the crash site involved, whether the decedent was a passenger in an aircraft or a person on the ground, whether presumed to have died instantaneously or proven to have died well after the relevant crash.[184] The Rule addresses this issue by noting that individual circumstances of death are unknown in most situations, and public comment supported a uniform approach to this component of compensation.[185] Survivors are entitled to noneconomic losses on a case-by-case basis based on the grants for decedents adjusted to their circumstances.[186] For those who survived the Pentagon and World Trade Center attacks, an award of $250,000 could be quite low in comparison to expectations.

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178 *Presumed Economic Loss Tables, supra* note 161, at Table For A Single Decedent Before Any Collateral Offset.

179 28 C.F.R. § 104.45(a).

180 *Id.*

181 *Id.* § 104.45(a)(1)-(3).

182 *See id.*

183 *Id.* § 104.44.

184 28 C.F.R. § 104.44.

185 *Victim Compensation Fund, supra* note 19, at 66,279.

186 28 C.F.R. § 104.46.

f. Collateral Source Deductions

The Rule provides for the deduction of "all" collateral sources as required by the Act.[187] As stated above, survivors are entitled to noneconomic losses on a case-by-case basis based on the grants for decedents adjusted to their circumstances.[188] The issue of importance to every claimant on this topic was whether the Rule would require the deduction of charitable donations to a claimant or the family of a deceased victim. The Special Master ultimately held that those contributions would not be considered as part of the deductions for each claimant.[189] He also has excluded savings accounts and 401(k) plans.

The Appendix to the Rule notes that most comments agreed with the decision not to deduct, while some comments favored deduction of charitable donations.[190] The rationale for the former group was a concern that people will not contribute to charities if they believe that the recipients are somehow penalized for receiving a donation.[191] Those in favor of a setoff for charitable deductions were concerned at windfalls for surviving families and a decline in donations as a result.[192]

The continuing debate over other collateral source deductions is focused on the Rule and the Special Master. However, Congress appears to have limited his authority to refuse setoffs for life insurance and other deductions by expressly stating in the Act that these deductions must be made. The public debate has not been focused to any extent on amending the Act, which could conclusively resolve this problem.

g. Attorneys Fees

The Rule does not set any limit on the contingency fee that a lawyer can charge a claimant. In the opening statement, the Special Master does express his view that fees providing more than five percent of an award would generally be excessive.[193] Claimants need not hire an attorney in order to file a claim for the Fund.[194] Indeed, the House of Representatives considered in passing the Act that the Association of Trial Lawyers of

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[187] *Id.* § 104.47(a).
[188] *Id.* § 104.46.
[189] *Id.*
[190] *Victim Compensation Fund, supra* note 19, at 66,290.
[191] *Id.*
[192] *Id.*
[193] *Id.* at 66,280.
[194] 28 C.F.R. § 104.33(d).

America offered to provide free legal services for claimants to the Fund, enabling 100 percent of Fund awards to assist the families of the victims.[195] In light of these facts, the Special Master concluded that the input that a claimant might receive from counsel would not warrant fees of up to thirty-three percent or more. Public comment on the issue was split.[196]

C. LIMITATION ON LAWSUITS

The airlines are faced with the unenviable circumstance of fighting a war on two fronts. Not only must they battle for survival following decreased revenues from a lower volume of passenger seat miles, but they must also prepare for the lawsuits that will inevitably result from the Terrorist Attacks.[197] The loss of revenues, while potentially devastating to the corporations as well as employees, is likely a temporary situation. Business travelers in particular must move about the country and the world, and the airlines can take steps to preserve capital (albeit harsh steps of layoffs or furloughs of personnel) while they await the return of their customers to pre-September 11th levels.

Lawsuits pose a different risk. If insurance policy limits are exhausted by repeated lawsuits, no amount of financial hedging or planning can remedy the verdict that exceeds an airline's coverage by tens of millions of dollars. Those claimants who choose litigation will undoubtedly file punitive damage claims. In jurisdictions that do not permit the inclusion of a punitive damage prayer in the Complaint, motions to plead a count for punitive damages will follow. The prospect of a verdict for several million dollars compensatory damages and several hundred million dollars in punitive damages is a sobering one indeed for corporations that have been losing money daily for the past several months.

1. Capping Industry Exposure

The Act addresses this risk in the form of financial protection at the courthouse. The Act limits the exposure of an airline for the aggregate of all lawsuits related to the Terrorist Attacks to

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195 147 CONG. REC. H5914 (Sept. 21, 2001) (statement of Leo V. Boyle, President, Association of Trial Lawyers of America).

196 *Victim Compensation Fund, supra* note 19, at 66,291.

197 *See, e.g.*, Reuters, *United Hit With Wrongful Death Suit, Widow of Passenger on Sept. 11-hijacked Jet Takes Action* (Dec. 20, 2001), *available at* http://www.msnbc.com/news/675826.asp.

the limits of its liability insurance.[198] Although the airlines most likely to face lawsuits are United Airlines and American Airlines, each of which had two aircraft commandeered as part of the Terrorist Attacks, the Act does not protect only those two airlines.[199]

Subsequent legislation in November 2001 expanded the scope of protection to not only airlines, but also to airports, aircraft manufacturers, and other potential targets of claimants. The Aviation and Transportation Security Act ("Security Act") is another example of accelerated legislative response to the Terrorist Attacks.[200] The Security Act mandates changes in airport security by establishing ownership criteria for the companies that screen passengers and baggage, citizenship and training criteria for the personnel working the security posts, and specifications for the machines that will be used to inspect checked baggage.[201] The Security Act was introduced in the Senate on September 21, 2001, passed by both houses of Congress on November 16th and signed by the President on November 19, 2001.

The final section of the second piece of legislation includes a short provision revising the Act to expand the scope of aviation industry entities protected from lawsuits.[202] The Security Act amends Section 408 of the Act to include "airport sponsors" as another class of entities exempt from judgments that exceed insurance policy limits.[203] This term means "the owner or operator of an airport."[204] Aircraft manufacturers, defined as entities that manufactured any aircraft used in the Terrorist Attacks or parts and components thereof, have similarly limited liability.[205] The property owners of the World Trade Center and all other persons with a property interest in the complex are included.[206] Finally, exposure for the City of New York is capped at $350 million or the limits of its liability insurance, whichever is greater.[207]

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198 *System Stabilization Act, supra* note 1, § 408(a).

199 *See id.*

200 *See* Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (codified as amended in scattered sections of 49 U.S.C.) [hereinafter *Security Act*].

201 *Id.*

202 *Id.* § 201.

203 *Id.* § 201(b)(2)(a)(1).

204 *Id.* § 201(d)(4).

205 *Security Act, supra* note 200, §§ 201(d)(3), 201(b)(2)(a)(1).

206 *Id.* § 201(b)(2)(a)(1).

207 *Id.* § 201(b)(2)(a)(3).

Moreover, the Security Act included wording not in the original Act that protects the carriers, airports, and manufacturers from contribution and indemnity claims.[208] This provides an additional layer of protection in the event any entity that is sued considers filing a third party action based in tort or contract.

Noticeably absent from the protections of the Act or the revisions of the Security Act are the airport security companies. They remain open to lawsuits that could bankrupt any of those companies involved in screening the flights involved in the Terrorist Attacks or the preceding connecting flights used by the terrorists. No doubts exist as to the legislative intent concerning the absence of security firms from the list of protected classes of aviation-related companies. The Security Act explicitly preserves an aggrieved party's right of action against security companies by stating that the limits on liability do not apply to those entities and by noting that the term "air carrier" does not encompass a security company.[209]

Why the change in approach by Congress and the President to the potential liability of aviation companies for losses arising from air crashes? A crash of a commercial passenger flight is a devastating event, not only for the passengers and crew, but also in terms of financial impact. Yet, when air crashes of commercial flights have occurred, the Government has no history of intervening to protect airlines or other companies in the aviation industry from uninsured exposure.

Unlike the lawsuits spawned by prior aviation accidents that most major airlines have experienced, the Terrorist Attacks brought the prospect of a crushing blow to the balance sheet of an airline. The crash of each aircraft resulted in deaths and injuries to far greater numbers of persons on the ground in comparison to the passengers and crew. The total persons killed and injured numbered in the thousands, not in the hundreds as with prior crashes.

United Airlines and American Airlines reportedly have $1.5 billion in liability insurance coverage for passenger bodily injury and death claims and property damage claims for each aircraft that was hijacked and crashed.[210] Those limits would usually be sufficient to indemnify the airline for compensatory damages

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[208] *Id.* § 201(b)(2)(a)(1).

[209] *Id.* § 201(b)(3).

[210] Lee S. Kreindler, *Pros and Cons of Victims' Fund, Compensation May Bring Salvation or Frustration*, N.Y. L.J., Nov. 27, 2001, at 5.

judgments and settlements resulting from passenger and bystander claims due to an accident. For the Shanksville crash, $1.5 billion is very likely sufficient to compensate the estates of the passengers. The Pentagon crash involved 125 persons killed on the ground in addition to the passengers on the aircraft, making policy limits possibly sufficient for claims. In the case of the World Trade Center crashes, a total of $3.0 billion is likely to be grossly inadequate.

At year-end, a total of 2940 persons are presumed dead from that attack, including 147 on the two flights. The estates of these victims could all feasibility file suit against United and American, seeking compensatory and punitive damages. Many more were injured in the evacuation and collapse of the towers. The leaseholders of the WTC could also sue, or their insurers could sue in subrogation, for the destruction of the two towers and other buildings in the complex. All of the affected businesses in the buildings destroyed or damaged by the two crashes and collapse of the two towers might also sue the two airlines. While proximate cause becomes increasingly tenuous, the list does not stop there. Local businesses that have lost revenues or gone bankrupt, and their creditors, may also line up at the county clerk office to file suit. Nearby apartment occupants and workers, many of whom did not sustain tangible bodily injury, may seek damages for their fear of living or working near the site.

The computations for all of these potential damages or just the damages that would flow from the more feasible causes of action, puts the $3.0 billion in indemnity coverage into perspective. Those limits, impressive in the abstract, would be exhausted before the battle is truly joined. In stepped Congress and the President to rescue an industry or at least some part of it, from financial ruin.

2. *More Rules*

If a claimant chooses to sue an airline, airport, security company, or other entity for damages caused by the Terrorist Attacks, the options usually available, as part of litigation strategy, have been severely limited. Congress federalized the cause of action for damages relating to the Terrorist Attacks by vesting jurisdiction exclusively within the federal courts.[211] Venue is limited to the U.S. District Court for the Southern District of

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[211] *System Stabilization Act, supra* note 1, § 408(b)(1).

New York.[212] That court must apply the substantive law, including choice of law rules, of the state where the air crash occurred.[213]

The constraints imposed by the Act will preclude claimants from suing the airlines or possibly other entities in the jurisdiction where they reside, which might have provided a more sympathetic jury. Plaintiffs also will not be permitted to file suit in jurisdictions known for higher verdict awards, which often involves filing suit in state court. These options have been available in many aviation accidents because major carriers are subject to personal jurisdiction in most states based on their routes. Defendants often remove the state court actions to federal court if possible, and the federal court cases are typically consolidated for discovery purposes through the Multidistrict Litigation process.[214] Nonetheless, that system provides plaintiffs options that might give them some leverage in the procedural posture of the case.

These legal constraints have already been applied. An insurance coverage dispute between the leaseholder of the World Trade Center and certain insurers of that property was filed on November 5, 2001 in the Southern District of New York.[215] The first estate to sue for a wrongful death arising out of the Terrorist Attacks commenced that case on December 20, 2002.[216] The case was filed by a New Hampshire resident against United Airlines in the Southern District of New York for a passenger on a flight that struck the World Trade Center.[217]

Despite the national call for restraint on filing suit as a result of the Terrorist Attacks, four additional lawsuits were filed against American Airlines, United Airlines, and airport security companies.[218] Each new suit was filed in the U.S. District Court for the Southern District of New York, the required forum under the Act.

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[212] *Id.* § 408(b)(3).

[213] *Id.* § 408(b)(2).

[214] *See, e.g., In re* Air Crash Off Point Mugu, Cal. on Jan. 30, 2000, 145 F. Supp. 2d 1156 (N.D. Cal. 2001) (crash of Alaska Airlines Flight on January 30, 2000).

[215] World Trade Ctr. Props. L.L.C. v. Ace Berm. Ins. Ltd., No. 01 CIV. 9781 (S.D.N.Y. Nov. 5, 2001).

[216] Reuters, *supra* note 197.

[217] *Id.*

[218] William Glaberson, *A Nation Challenged: Civil Actions; 4 Suits Filed, Despite Call For Restraint by Lawyers*, N.Y. TIMES, Jan. 15, 2002, at A13.

III. THE VERY SHORT HISTORY OF THE LEGISLATION

The Act made its way from pen to paper to the President's desk in record time. How much forethought went into a short bill, with few amendments that will cost the American taxpayers upwards of $25 billion over the next few years? The legislative history is very brief but does provide some insight into the motivations for the Act.

The bill was introduced in the House as H.R. 2926 on September 21, 2001.[219] Written legislative history exists on floor debate when H.R. 242 and 244 were called for votes. Those procedural resolutions required a vote on the Act with no amendments and permitted very limited debate.[220] Some criticized the excessive urgency to vote on the bill that day.[221] The procedural votes both passed.[222]

One proponent of the Act noted that the Dow Jones Industrial Average had dropped 1200 points that week and that banks were closely watching Congress for action in anticipation of possibly refusing to extend airline credit.[223] A comparison to the Chrysler bailout was made by a few speakers as an example of how Government funding of a corporate rescue can be advantageous for the company, its workers and taxpayers.[224] An equity position in airlines that receive Government backed loans was praised to protect the taxpayers.[225]

Support for the Act was far from unanimous. One major criticism of the bill was the lack of immediate protection for jobs of airline industry personnel and those in related businesses that depend on a healthy industry for their work.[226] Since the Act has a specific provision concerning a freeze on salaries above $300,000, multimillion-dollar salaries became a lightning rod for criticism of the Act. Words like "obscene" were used to describe a companion provision allowing severance pay within specified limits for officers of airlines that accept Government assistance,

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[219] H.R. 2926, 107th Cong. (2001).

[220] 147 CONG. REC. H5875 (daily ed. Sept. 21, 2001) (statement of Rep. Reynolds); *id.* at H5884 (statement of Rep. Reynolds).

[221] *Id.* at H5882 (statement of Rep. Doggett).

[222] *Id.* at H5883, H5893.

[223] *Id.* at H5877 (statement of Rep. Foley).

[224] 147 CONG. REC. H5878 (daily ed. Sept. 21, 2001) (statement of Rep. Foley).

[225] *Id.* at H5881 (statement of Rep. Bentsen).

[226] *Id.* at H5877 (statement of Rep. Obey); *id.* at H5880 (statements of Reps. Waxman & Sanders); *id.* at H5889 (statements of Reps. Brown & Brady); *id.* at H5890 (statements of Reps. Schakowsky & Udall).

despite the bill addressing private corporations for which issues like executive compensation are generally not an item of concern for the Government.[227] A letter from the AFL-CIO president was quoted as another basis to delay the vote and take more time for committee meetings.[228] One representative suggested that the American people do not care about the solvency of the airlines.[229]

The legislators did not spend much time addressing the Fund. Some did express concern that victims of other disasters and attacks, including Oklahoma City, did not receive similar treatment.[230] One Representative voiced opposition to an open-ended program where families of those victims who earned large salaries could prove and recover losses in the millions of dollars, and expressed frustration at the procedural bar from offering an amendment with a damages cap.[231]

The issue of security for passengers was raised repeatedly as a more immediate concern that would not be addressed by the Act.[232] The House Speaker and Minority Leader promised their respective legislative constituencies that a bill to enhance security would follow in short order.[233] The bill that ultimately became the Security Act was introduced that same day in the Senate.[234]

A motion to recommit the Act back to committee was made for purposes of including two amendments.[235] One proposed section of the Act would have required airlines to pay eighteen months of health insurance premiums for employees laid off in the two years following the Terrorist Attacks by using some of the Government funding. A second provision would have required the use of FAA personnel to screen all bags and passen-

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227 147 CONG. REC. H5880 (daily ed. Sept. 21, 2001) (statement of Rep. Waxman).

228 *Id.* at H5879 (statement of Rep. Filner).

229 *Id.* at H5876 (statement of Rep. George Miller).

230 *Id.* at H5879 (statement of Rep. Sensenbrenner).

231 *Id.* at H5892 (statement of Rep. Spratt).

232 147 CONG. REC. H5876 (daily ed. Sept. 21, 2001) (statement of Rep. DeFazio); *id.* at H5882 (statement of Rep. Doggett); *id.* at H5892 (statement of Rep. DeLauro).

233 *Id.* at H5910.

234 S. 1447, 107th Cong. (2001).

235 147 CONG. REC. H5915 (daily ed. Sept. 21, 2001) (statement of Rep. DeFazio).

gers as soon as possible. The motion to recommit was rejected.[236]

The House passed the Act on a 356 to 54 vote that same evening of September 21st, and a companion bill was passed in the Senate on a 96 to 1 vote the same day.[237] President Bush signed the Act into law on September 22, 2001.

IV. IS THE FUND THE BEST CHOICE FOR CLAIMANTS?

Claimants must determine whether they wish to seek recovery from the Fund or pursue damages through litigation. The Act requires that a claimant forego any lawsuit once a claim is filed with the Fund.[238] The Rule requires that any lawsuit must be withdrawn no later than March 21, 2002 or the claimant will not be permitted to file a claim with the Fund.[239]

The Presumed Loss Tables should help guide claimants through that decision-making process. Of course, the inability of a claimant to seek both recovery from the Fund and recovery via a lawsuit means that some doubt will always exist as to whether the choice of pursuing litigation would have resulted in a larger monetary recovery or some other form of less tangible satisfaction. However, it is unlikely that any claimant will be satisfied with recovery from the Fund, regardless of the amount, if the claimant does not appreciate the carefully chosen admonition by the Special Master in the introduction to the Rule.

In his opening statement, the Special Master describes the Fund as a "no-fault alternative to tort litigation."[240] The choice of words is accurate and descriptive. The Fund will not and should not constitute a replication of the court system. The Fund will accomplish precisely the opposite, alleviating the contentiousness for claimants that inevitably occurs when a plaintiff pursues a high value claim in a very public forum.

Consequently, claimants will not observe in the claim process of the Fund most of the typical attributes of a litigation claim. There will be no juries that can sympathize with their plight or the potential for damage awards that can reach into the tens of millions of dollars for compensatory damages, perhaps multiple of that sum for punitive damages. They will have an opportunity

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[236] *Id.* at H5917.

[237] S. 1450, 107th Cong. (2001).

[238] *System Stabilization Act, supra* note 1, § 405(c)(3)(B)(i).

[239] 28 C.F.R. § 104.61(b).

[240] *Victim Compensation Fund, supra* note 19, at 66,275.

to address the Special Master or his designee on the scope of damages but not in the public forum that a high profile trial affords to air those concerns before a much wider audience.

Some have criticized the Special Master for refusing to award damages of tens of millions of dollars for certain highly paid victims. One commentator even suggested that Congress required awards of that magnitude, as if rendered by a jury, by its "applicable state law" wording in the Act.[241] These comments and similar criticisms ignore the decision made by the Congress in passing this legislation. Congress could have, but did not, allow claimants to file suit against whomever they believe culpable, proceed to verdict before a jury and have the Government pay the judgment. That process would have created awards that would most closely resemble lawsuits against defendants. Instead, Congress created a more limited vehicle for recovery.

Moreover, the Act specifically notes that there will be no need, nor a right, to prove negligence against any entity in the process of submitting a claim to the Fund.[242] Some claimants may understandably prefer to pursue from a tribunal a finding of liability against some entity for the death of their family members. A claimant may also desire a jury verdict for a number of reasons, including vindication of the rights of the decedent or punishment of the wrongdoer. Obviously, pursuing recovery through the Fund will not achieve that goal. The Special Master has noted that the Fund is intended as a process that will be non-adversarial in nature and will deal strictly with the appropriate quantum of damages for claimants.[243]

If claimants bear these purposes of the Fund in mind as they proceed with a claim, many claimants will likely conclude that filing a claim with the Fund was a wise choice. The following analysis compares awards from the Fund and the potential for an award by verdict from a jury.

A. Typical Recoveries From the Fund

The two alternatives for claimants begin with reviewing the potential damages that two typical claimants would recover from the Fund, before collateral source deductions. The most signifi-

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[241] Lee S. Kreindler, *WTC Compensation; A Sad Disappointment*, N.Y. L.J., Jan. 4, 2002.

[242] *System Stabilization Act*, *supra* note 1, § 405(b)(2). "[T]he Special Master shall not consider negligence or any other theory of liability." *Id.*

[243] *Victim Compensation Fund*, *supra* note 19, at 66,274.

cant distinction is dependents of a decedent. This article reviews two hypothetical domiciliaries of New York employed at the World Trade Center.

First, consider the expected recovery from the Fund for a claimant representing a single decedent who was age 35 at the time of the Terrorist Attacks, earning $100,000 per year, with no dependents. The Presumed Loss Tables state that an award of $1,215,619 can be expected. But note, that amount does not include burial costs and any other losses that a claimant seeks to prove outside the value of presumed expected wage loss.

The analysis may not end there. If the Special Master were to limit recovery to only that permitted by "applicable state law," the award could decrease appreciably. Under New York law, the estate could not recover wage loss because there is no dependency by any immediate family members.[244] This would decrease the award to approximately $250,000 for only the presumed noneconomic loss.

Next, consider the recovery for a married decedent who was age 45 with two dependents, earning $200,000 at the time of the Terrorist Attacks. The Presumed Loss Tables state that an award of $2,478,938 is the likely result of that claim. New York law would not affect economic loss recovery unless the dependents were other than children, in which case some limit might obtain, depending on the degree of kinship of the dependents. Importantly, an increase of the decedent's income to $1 million per year might only marginally increase the award. Unless the Special Master changes his position, this claimant would probably be awarded approximately $3 million.

B. Applying the "Super" Collateral Source Rule

The benefits accorded these claimants by all sources, other than charities, must next be deducted.[245] With respect to the single decedent, assume that she owned a life insurance policy for $100,000 plus she received an additional $50,000 policy from her employer. This deduction of $150,000 would leave an award of approximately $1,065,213 to her estate. If New York law is applied to the economic loss, recovery would decrease to $250,000 less the $150,000 in collateral sources, leaving an award of $100,000, but presumably not less than approximately $250,000 to be awarded.

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[244] N.Y. Est. Powers & Trusts §§ 5-4.4(a), 4-1.1 (Consol. 2001).

[245] 28 C.F.R. § 104.47(a).

As for the married person, assume he had purchased a policy with $1 million in coverage and had an additional $200,000 policy through his employer. Also, assume that his employer pays death benefits to his family at $250,000. This would leave an award of $1,028,938 for his family after these collateral source deductions.

C. How Claimants Might Fare at the Courthouse

The process for determining a likely verdict for the two hypothetical claimants involves numerous variables. The issue of damages is not even ripe until the claimants could prove liability. It is too soon after the Terrorist Attacks to identify any possible defendants and the potential theories against each. However, liability should be considered so, at a minimum, there is an appreciation of why it carries a much higher risk of no recovery for most claimants. A comparison to the Fund does not need to consider suit against terrorists, since such lawsuits can be filed regardless of whether a claim is made to the Fund.

1. Liability

A comparison of damages from the two possible sources, the Fund and a lawsuit, presumes that both have dependable sources of payment for a damage award. The Fund does not require proof of negligence, and the Treasury of the United States backs its payments.[246] Litigation, however, requires a judgment, and litigation requires that the judgment must be collected from a defendant. The risk of a plaintiff proceeding to trial and a jury returning a defense verdict is a very real one in almost every case. These circumstances are no different.

All actions must be filed in the United States District Court for the Southern District of New York.[247] The Act requires that the Court apply the law of the crash site, including the choice of law Rules for that state.[248] Consequently, Virginia law will be applied to plaintiffs suing on behalf of persons injured or killed in the Pentagon crash, Pennsylvania law for the Shanksville crash, and New York law for the victims of the World Trade Center crashes. The choice of law rules of those states might then require that the law of states other than Virginia, Pennsylvania, or New York to govern certain issues in the case.

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[246] *System Stabilization Act, supra* note 1, § 406(b).
[247] *Id.* § 408(b)(3).
[248] *Id.* § 408(b)(2).

The Court will likely apply the doctrine of depecage, whereby the law of different jurisdictions governs particular issues in the case.[249] Depecage has been repeatedly employed in aviation disaster cases to apply separate law to issues of liability and damages.[250] The Second Restatement on Conflict of Laws also follows the doctrine of depecage.[251]

First, the law that would control liability is unknown. Choice of law would depend in part on what parties are sued by plaintiffs. Using the two hypothetical claimants, the New York choice of law rules would look to the place of the tort.[252] If aviation industry companies were sued, the analysis would focus on the location of where their alleged wrongful acts occurred, presumably the states where relevant airports are located.

Second, proof of liability may be very difficult to locate and admit in evidence.

Plaintiffs might pursue claims against the airport security companies, alleging negligence for permitting the terrorists to take on board the aircraft certain weapons used in the Terrorist Attacks to control the aircraft. The proof of what items the terrorists were able to bring through the security checkpoints, and then use in the aircraft hijackings, is limited. Telephone communications by persons on those aircraft before they crashed and any information on cockpit voice recorders might provide some details. Would those communications by recording or recitation by a witness be admissible? Direct evidence of the terrorists' actions might be available following a criminal trial by the United States against those terrorists, thereby allowing plaintiff to use the evidence in support of a civil claim. However, such a criminal trial might not occur until years after the expiration of the statute of limitations for a civil action.

Moreover, plaintiffs would need to prove that the security personnel were negligent, in that the items were illegal to carry on at that time and that a reasonable person under the circumstances would have been able to detect those items brought through the security checkpoints. Since there is no indication to date that firearms were used, the plaintiff would have a more difficult time in proving that the security personnel should have

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[249] *See, e.g.*, Hutner v. Greene, 734 F.2d 896, 901 (2d Cir. 1984) (reversible error to apply law of one state all issues).

[250] *See, e.g., In re* Aircrash Disaster Near Roselawn, Ind. On Oct. 31, 1994, 926 F. Supp. 736 (N.D. Ill. 1996).

[251] RESTATEMENT (SECOND) CONFLICTS OF LAWS §145 (1971).

[252] *See* Padula v. Lilarn Props. Corp., 644 N.E.2d 1001, 1002-03 (N.Y. 1994).

detected whatever items were smuggled through the checkpoint and ultimately used as weapons. A claim against an airline is more attenuated, but it might follow the same theory and simply seek to impose liability on the basis that the airline hired the security personnel.

A claim against government entities that own or operate relevant airports where the terrorists gained access to the aircraft might not satisfy rules for good faith claims, or at a minimum would be far more difficult to prove. The airports did not have direct responsibility to hire security personnel for the checkpoints. Thus, these claims would have to first establish a duty owed to the passengers, in addition to aforementioned burden of proof concerning negligence by the security personnel at the checkpoint.

Finally, if a plaintiff were successful in a claim against any of these aviation industry companies, the same issue of a collectible judgment would remain. Airline industry defendants (except for the security companies) are immune from a judgment that exceeds insurance policy limits.[253] While those policies may have significant limits of $1.5 billion for each of the aircraft and perhaps equal or greater limits for the airports, those funds would be consumed quickly following the execution of several judgments. The security companies do not enjoy similar protections from the Act, but their insurance and assets might be quickly exhausted following a series of judgments against them.

2. *Damages*

With respect to the choice of law for damages, the analysis involves fewer variables than liability and is generally predictable. Considering the two hypothetical claimants suing on behalf of decedents at the World Trade Center site, the New York choice of law rules employs "interest analysis" to determine what jurisdiction has the greatest interest in having its law govern damages. New York has moved away from the historical *lex loci delecti* approach to tort cases, recognizing that the location of the event causing the injury is often fortuitous or insignificant in comparison to other facts related to the event.[254] The analysis concerns the significant contacts with the parties and the jurisdiction in which they are located, as well as whether the purpose

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[253] *System Stabilization Act, supra* note 1, § 408(a).

[254] *In re* Allstate Ins. Co. v. Stolarz, 613 N.E.2d 936, 939 (N.Y. 1993).

of the law applied will be regulation of conduct or allocation of loss.[255]

In cases involving loss allocation, which would include a wrongful death statute, New York applies three rules established in its early decision, *Neumeier v. Kuehner*.[256] The first "*Neumeier* Rule" requires that, if the parties share a common domicile, the law of that jurisdiction should control.[257] Second, if the parties reside in different domiciles, and the injury occurred in the domicile of one party, the law of that domicile will apply.[258] Third, if the parties are from different domiciles and the injury occurred in neither domicile, the law of the place where the accident occurred applies unless applying a different law would "advance the relevant substantive law purposes" of the jurisdictions involved.[259]

With respect to the two hypothetical persons killed in the New York attack, who were domiciliaries of New York, New York law will almost certainly govern damages. New York undoubtedly has the greatest interest in governing the recovery of its own citizens for an accident that occurs in the state. If airline industry defendants are sued, it is likely that New York law would still govern damages since the *Neumeier* rules would require the application of the law where one party resides and where the accident also occurred.

If the two decedents had been domiciliaries of a state other than New York, New York law might still govern damages. Although the state where plaintiffs live may have an interest in governing the damages recovered, the third *Neumeier* rule requires that the law of the place where the event occurred governs absent a basis to displace that law. The choice of law analysis might also involve whether the plaintiffs were working at the World Trade Center in the course of their normal employment and maintained offices there or were simply transitory visitors on the day of the attack. Those in the former category are far more likely to have New York law govern the damage recovery.

New York law is therefore likely to govern these two hypothetical claims arising from the World Trade Center attacks. These

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255 Cooney v. Ozgood Mach., Inc., 612 N.E.2d 277, 281 (N.Y. 1993).

256 286 N.E.2d 454, 457-58 (N.Y. 1972).

257 *Id.* at 457.

258 *Id.*

259 *Id.* at 458; *Cooney*, 612 N.E.2d at 281.

plaintiffs would recover damages for economic loss to the extent that family members designated by statute could prove financial dependency on the decedent. Thus, claims for single decedents who had no dependents could result in their estates being awarded virtually no damages for economic loss.[260]

Moreover, New York law does not permit wrongful death claimants to recover damages for grief of the surviving family members, nor does it law allow hedonic damages to compensate for loss of enjoyment of life.[261] The estates could obtain an award for pre-impact emotional distress.[262] The award would be sustainable on appeal if in the range of $200-$500,000.[263]

The application of New York law would result in awards for single decedents without dependents that will be, on average, far less than the awards for those same persons by the Fund. Awards by the Fund will, at a minimum, provide a non-economic loss component of $250,000 to the decedent's estate and, in most cases, at least, $250,000 for economic loss. Litigation may provide virtually no recovery for economic loss and perhaps less than $250,000 for noneconomic loss.

In reviewing the first of two hypothetical claimants, the estate of the single decedent with no dependents had been awarded at least $100,000 after collateral source deductions and possibly as much $1 million if the Special Master does not impose the New York wrongful death law restriction on the recovery. Alternatively, the award by a jury would be small in comparison once the wrongful death law is strictly applied by them or by the trial judge and the Second Circuit.

For those decedents with persons financially dependent upon them, the relative benefit of litigation versus the Fund will depend upon the earnings of the decedent and the amount of money received from collateral sources. The hypothetical married decedent with dependents would present an analysis similar to that conducted pursuant to the Rule with respect to increases

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260 *See, e.g.*, Abruzzo v. City of N.Y., 649 N.Y.S.2d 172, 173 (N.Y. App. Div. 1996) (verdict for $1.2 million reduced to $150,000 for single decedent with no financial dependents); Dilger v. Consol. Rail Corp., No. 95 Civ. 9674, 1997 U.S. Dist. LEXIS 1027, at *1 (S.D.N.Y. Feb. 4, 1997), *aff'd*, 133 F.3d 906 (2d Cir. 1997) (upholding jury award of $75,000 for economic loss in similar circumstances).

261 Gonzalez v. N.Y. City Hous. Auth., 572 N.E.2d 598, 600-01 (N.Y. 1991).

262 *See* N.Y. EST. POWERS & TRUSTS § 11-3.2(b) (Consol. 2001).

263 *See, e.g., Dilger*, 1997 U.S. Dist. LEXIS 1027, at *10-11 ($675,000 in pre-*and* post impact distress, including twenty-five minutes of pain and suffering from severe injuries); Lang v. Bouju, 667 N.Y.S.2d 440 (N.Y. App. Div. 1997) ($239,000 for pre-impact fear in motorcycle crash reduced to $100,000).

in compensation over the remainder of the decedent's work life, corresponding deductions for consumption, and a reduction to present value. In periods of low to moderate inflation, two to five percent, the expected increases in pay are generally equivalent to present value reduction, such as the 5.13 percent used by the Special Master. Consequently, simply multiplying income of the decedent by the remaining years in his work life can very roughly approximate an award. Here, the hypothetical decedent earning $200,000.00 per year with twenty years of work-life could be expected to receive up to $4 million in income, before deductions for consumption. Thus, the Special Master's award of approximately $2 million is lower but not significantly different from the award that might be returned by a jury and upheld on appeal.

However, the reduction for collateral sources for that claimant would reduce the award by the Fund to $1 million. No such deduction would occur in a lawsuit applying New York law. Therefore, the married decedent with dependents would likely receive a verdict of higher value in litigation than in a claim to the Fund. His estate would receive as much as $3 to $4 million for economic loss and approximately $200,000 to $500,000 for a survival claim, resulting in a jury award of $3.2 to $4.5 million.

D. Weighing Litigation Risks Will Lead Most to Seek Fund Awards

The very real risks of a liability trial must be assessed before one can conclude that it is worthwhile to proceed with litigation in lieu of a claim to the Fund. A simple analysis of a potential recovery from a jury versus expected recovery from the Fund would be misguided and fail to account for other problems that a plaintiff would encounter in attempting to proceed to a collectible judgment in a lawsuit. The share of any judgment that must be provided to pay counsel must also be a factor in comparison to the absence of a fee or very modest fee that a claimant would pay for filing with the Fund.

For most claimants, the consideration of those litigation risks will lead them to seek predictable awards from the Fund that are guaranteed for payment in 120 days. The potential claimants for whom litigation initially appears to be the best option are those with significant collateral source reductions. Their awards from the Fund could be quite low. If true, those claimants would then have only that minimal award to lose in seeking re-

covery through litigation, to the extent they are able to present a good faith claim against any entity.

V. IS THE PROTECTION OF THE AIRLINE INDUSTRY JUSTIFIED?

The Government has quickly authorized the expenditure of up to $15 billion in direct assistance to airlines, and it authorized further support of the industry of at least $10 billion through restrictions on lawsuits and a corresponding establishment of the Fund. Congress must be able to justify its spending of taxpayer funds. Even for an institution that measures its budget by the trillions, this Government allocation is worthy of notice and examination.

The assertion that Congress should have done nothing to assist the industry and nothing to help preserve American jobs can be justified only by a defense of free market capitalism in its purest form. If the Government consistently maintained a posture of refraining from involvement in private industry, that approach might be justified. Yet, Government fingerprints are constantly found on the ledgers of most corporations in America.

Subsidies similar to this aid package are routinely enacted in the form of tax benefits for corporations. The bailout of the Chrysler Corporation targeted saving the jobs of a particular company. The Small Business Administration exists to help foster certain types of corporations. The list could go on with examples of how the Government seeks to support certain industries or even particular corporations. Whether each of those efforts is justified is not relevant for this discussion. The fact that it occurs is sufficient to review whether aid to the airline industry is a wise investment for the American taxpayer.

In passing the Act, several members of Congress left no doubt as to what value they place on the airline industry as a part of our economic infrastructure:

> [The airline industry] is a critical component to our way of life and a vital segment of our national economy. Our airlines move people and products across America and throughout the world. They serve not just business and tourism but can, quite literally, determine whether we are able to compete in a global economy.[264]

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[264] 147 CONG. REC. H5884 (daily ed. Sept. 21, 2001) (statement of Rep. Reynolds).

Upon review of quarterly and end-of-the-year losses, the effect of the Terrorist Attacks on the airline corporations is undeniable.[265]

> Make no mistake, there is strong bipartisan support for stabilizing America's air transportation system and for ensuring the victims of September 11 get the assistance they need as they rebuild their lives. How to do those things is a difficult and complex question, but a crucially important one. At stake is nothing less than the strength of the economy, hundreds of thousands of American jobs, and our values and way of life.[266]

> "[I]t is our responsibility to preserve the American aviation industry."[267]

The statistics concerning unemployment caused by deterioration of the industry are also objective and compelling. Approximately 100,000 jobs in the aviation industry were lost in the first ten days after the Terrorist Attacks.[268] The Boeing Company alone announced a layoff of 30,000 workers.[269] By one estimate, for every 100 jobs created by the airline industry, an additional 250 jobs are created by those industries that service the airlines.[270] Companies that provide fuel, maintenance, engine overhauls, food service, uniforms, and so many other services are all dependent on the continued operation of the airlines. Consequently, the jolt to the industry put at risk another 250,000 jobs. This data does not begin to measure the spillover into thousands of businesses that require regular air travel to reach their customers and vendors in the United States and throughout the world, and which, in turn, support hotels, car rental agencies, taxis, and other businesses.

Some amount of aid to the industry is necessary to help save these jobs, but that aid should be dispensed with caution, as the Board has exercised in reviewing the first applications for the Government-backed loan program. The grant program might have benefited from the use of some discretion by Government officials in dispensing up to $5 billion in payouts for lost business. While the volume of business before the Terrorist Attacks is one indicia of how to divide that money among the many air-

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265 *See, e.g.*, airline losses reported *supra* note 57.

266 147 CONG. REC. H5884 (daily ed. Sept. 21, 2001) (statement of Rep. Frost).

267 *Id.* at H5887 (statement of Rep. Thune).

268 *Id.* at H5885 (statement of Rep. Hastings).

269 *Id.* at H5891 (statement of Rep. Dicks).

270 *Id.* at H5885 (statement of Rep. Hastings).

lines seeking aid, the Act should have included other factors for consideration by the Board or by a similarly constituted panel.

The liability limitations against potential industry defendants, procedural constraints on lawsuits, creation of the Fund, and the extending of excess coverage for future terrorist-related liability all find justification in a goal other than protecting carriers as a vital component in the American economic engine. A legitimate concern exists to avoid a withdrawal by the aviation insurance market. The Act contains no reimbursement or direct protection of those insurers. Yet these types of litigation relief will help maintain the availability of insurance by discouraging litigation against policyholders and by encouraging use of the Fund.

One might argue that juries would return fair verdicts against airlines, airports, and manufacturers and find liability only if evidence was duly presented to persuade reasonable persons of their culpability for the Terrorist Attacks. But that result could be reached only if the insurers of those airlines paid the high costs for defending against thousands of claims in various jurisdictions and appeal each adverse verdict. The reality is that a very high percentage of all civil cases, including aviation litigation, settle before trial. Concern over costs could easily lead to insurers settling claims, but also result in them refusing to rewrite these same risks again.

Not unlike the domino effect on the commercial side of the airline business, an extreme volume of litigation could have the same debilitating effect on the insurance market and consequently on the industry's ability to do business. Lack of insurance can translate to difficulty for carriers and manufacturers to obtain credit from lenders. Lack of credit means an inability for those companies to invest in new equipment and remain competitive in the world market.

An enhanced role for Government in the aviation industry is necessary for a crisis of the magnitude experienced following the Terrorist Attacks. How fast, how involved, and how long an intervention is needed will unfold over the first eighteen months after September 11th.

VI. CONCLUSION

The Government has decided to expend significant amounts of taxpayer funds and exercise a more involved role in the continued viability of the aviation industry. With that role comes

the responsibility of using discretion to decide what portions of the industry most require aid and which corporations within those business areas warrant assistance. The extension of credit in exchange for equity in carriers, excess insurance coverage for terrorist risks, control of carrier routes, and litigation alternatives may save jobs and benefit the economy overall. These same measures will carry risks for a Government that becomes too deeply involved in the day-to-day operations of carriers or the financial well being of particular corporations.

Comment


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